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ABSTRACT

This pamphlet is intended to answer questions about copyright with respect to the reception and use of satellite transmissions by educational establishments in the United Kingdom. Addressed to those who receive and record satellite transmissions, Part One discusses both license and copyright requirements, including situations in which permission may be needed under copyright law to use recorded broadcast programs; types of licenses that are required to operate receivers; how to obtain these licenses; the copyright implications of satellite reception in various situations; and Britain's treaty obligations to provide copyright protection for materials and performers from other countries. Part Two, directed at those who intend to use satellites to disseminate video material, notes that copyright is traditionally territorial, and that, since a satellite is a transmitter in space, it is not in the territory of any nation and the rights granted cannot be related to the law of any country. The problems created by this situation are then discussed together with the lack of an international copyright law and the interest of the EEC (European Economic Community) in treating broadcasts in the same way as goods and services. The implications for producers of video programs and what they should do are also considered. The pamphlet concludes by stating that, at the time of writing, it was too early to give guidance on either practical or contractual arrangements between educational producers of material and the operators of satellites. A statement on off-air recording for educational purposes which reflects the situation under the 1956 Act is appended. (BBM)

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THE USE OF SATELLITES BY EDUCATION

Licences, Copyright and Contracts

Geoffrey Crabb

NCET NATIONAL COUNCIL FOR EDUCATIONAL TECHNOLOGY

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INTRODUCTION

Satellite transmissions are increasingly being received by educational establishments to enhance the resources available for subjects such as linguistics. Many wish to record programmes broadcast over satellite for later use and a number of questions have been raised about copyright.

Recently, a new development has been announced which is the intention to launch a new satellite called Olympus and the decision of the European Space Agency to permit free use for educational purposes. This means that video producers will be permitted to use Olympus to broadcast material over a large area of Europe and a number have already expressed an interest.

This paper is in two parts. Part One is intended for those who receive and record satellite transmissions. Part Two is for those who anticipate using satellites for transmission purposes.

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PART ONE

RECEIVING AND RECORDING SATELLITE BROADCASTS IN THE UK

Licences

1. Many institutions at present receive and record signals from the three types of satellites currently in use. First, there are communication satellites, primarily designed to transmit messages such as telephone calls. Then there are meteorological satellites and finally those used by radio hams. Communication satellites such as Eutelsat and Intelsat are used, incidentally, to transmit television programmes but they are not primarily intended for general reception by the public in the way that BBC and IBA transmissions are. They are intended for reception by weather stations, subscribers to Pay TV or by cable network operators.

2. However, with the increased efficiency of satellite receiving equipment including improved antennae (dishes), the general public can buy large receiving dishes costing £1,200 to £2,000 for direct reception of these broadcasts. A growing number of institutions are also picking up satellite signals for teaching and training purposes.

There is no law in the UK which makes it illegal to receive a satellite broadcast although permission may be needed under copyright law to use a receiver to give a public performance or to make a copy of material which is being broadcast. However, the Cable and Broadcasting Act 1984 does make it an offence to receive a Pay TV programme with intent to avoid payment. On the other hand, licences are legally required to operate receivers, the most obvious one being that obtainable from the Post Office covering the use of television, the proceeds of which are mainly devoted to funding the BBC. In addition, under the Wireless Telegraphy Act 1949 a licence, costing £10 and called a Television Receive Only Receiving Equipment (TVRO) Licence is available from the DTI, Radio Regulatory Division, Room 513, Waterloo Bridge House, Waterloo Road, London SE1 8UA. The licence permits the installation of apparatus designed to receive television or sound radio programmes which are transmitted by means of a satellite. The programmes include those intended for restricted groups of audiences which appears to cover programmes intended for cable distribution.

The TVRO licence applies to radio and television broadcasts. In respect of the reception of weather pictures from polar orbiting and geostationary satellites, the DTI issues, free of charge, a letter of authority permitting the reception of signals emitted by satellites operated and exploited by the European Space Agency (as opposed to ESA satellites exploited by commercial entities) and any artificial earth satellite engaged in scientific space research operated by the US government's National Oceanographic and Atmospheric Administration. This covers signals used in the process of earth sensing and the position appears to be that if both the TVRO licence and the letter of authority are obtained then it is legal to receive satellite signals from any source. The DTI is careful to point out that neither the licence nor the letter of authority carry any guarantee that services will be receivable without interference, presumably meaning with clarity or because of encryption.

3. Where satellite signals are diffused through a cable system, additional licences are required from the DTI and from the Cable Authority. These must be acquired by the provider of the cable service (not the subscriber) except where the cable distribution is within a single set of premises in single occupation. It is assumed that a campus would qualify for this exemption even though covering a number of buildings which might be widely scattered. However, clarification in relation to individual systems should be sought from the Cable Authority, Gillingham House, 38-44 Gillingham Street, London SW1V 1HU. Telephone 01-821 6161. In passing, it is worth noting that the erection of a receiving dish may require local planning permission and building regulations permission.

Copyright

4. The other matter which causes concern in education is the copyright implications of satellite reception. To receive a broadcast of any description does not infringe the copyright in the broadcast material in it unless, in receiving the broadcast, a public performance is given. This generally means to an audience other than one which is purely domestic or quasi domestic, although the law includes a provision that performances in a school class are not 'public'. Nor would it infringe the copyright to distribute the broadcast through the cable system of an educational institution. But copyright does become an issue if a recording is made off the air, a facility of great value to those using satellite broadcasts for linguistic purposes, or off cable.

5. It is important to understand that under Britain's treaty obligations the literary, dramatic, musical and artistic works and the films and videos of most countries will be protected. Performers, such as actors and musicians, may also be protected under separate provisions. This means that foreign material is protected in this country in the same way and to the same extent as the domestic product. Also, it matters not a jot whether the material (say a French song or a German film) arrives here via some technological miracle like a satellite or is brought over on the ferry. If material is protected the method of dissemination is irrelevant.

6. The up-shot of this is that, generally speaking, it may be assumed that where the material being transmitted from the satellite is protected by copyright in the UK, to make a recording of it may well infringe the copyright. This would particularly be the case with a sound or television broadcast which would almost certainly be from a tape, film or disc which would attract copyright protection. The position is much less clear where the signal is from a weather or earth sensing satellite since copyright will not exist in the image of cloud formations or natural objects transmitted live. Unfortunately it is difficult to determine the copyright status of transmitted images of this type and the best advice which can be given is to treat them in the same way as copyright sound and television programmes.

7. Some years ago CET published a statement about off-air recording of BBC and IBA programmes which included a set of rules which might be followed by those who decided to record off-air without the necessary prior permissions. This statement is reproduced as an Annex to this document and to the extent that it is appropriate for domestic broadcasts it is also relevant for satellite transmissions.

However, the passing of the Copyright, Designs, Patent Act 1988 will eventually change the legal position relating to off-air recording and a summary of the new provisions will be found in the NCET free leaflet 'Copyright: the Act of 1988'.

SUMMARY

Licences
Satellite reception is permitted provided the TVRO licence is obtained (see 2). A letter of authority is also required if signals from weather

stations are to be received.

In certain circumstances a licence may be required if the signals are to be diffused through a cable network (see 3).

Local planning permissions may be needed to install the satellite receiving dish.

Copyright
Material received via a satellite will be protected to the same extent and in the same way as would the same material acquired in other ways. Generally, although it may be legal to record data, the unauthorised recording of radio or television programmes would almost certainly infringe the copyright in the audio, video or film material being received.

Until the new copyright provisions come into force, those who decide to record off-air are advised to follow the guidance given in the Annex which was issued in respect of domestic broadcasts.

PART TWO

THE USE OF SATELLITES TO DISSEMINATE VIDEO MATERIAL

General

8. As already stated, the existing satellites are not primarily intended for the transmission of broadcasts for direct reception by the public without any intermediary, such as a cable system operator. The power used is too low for reception by small dishes although some institutions have invested in large dishes in order to 'eavesdrop'. However, Olympus will be a DBS (Direct Broadcast Satellite) operating at sufficient power to permit direct reception using modest antennae.

9. The use of a television transmitter in space able to beam sound and pictures over a vast area has put the international copyright world into a tail-spin. Many millions of words have been written and spoken about the copyright implications of this development and it is not the intention here to discuss the highly technical and legalistic issues which arise. However, a summary of the points will provide a useful background to what follows.

Copyright

10.1 Copyright is traditionally territorial, that is creators and producers tend to split up their rights and permit publication, broadcasting, public performance, etc related to a country or region. Usually, the right to broadcast is linked to the transmitter being used rather than the area of reception. For example, the BBC in acquiring the right to broadcast a piece of material will take the right to transmit over all its transmitters in the UK without any reference to the reception area over which it has no precise control.

10.2 A satellite is a transmitter in space but since it is not in the territory of any nation the rights granted cannot be related to the law of any country. There has been much discussion about where the broadcast occurs, on the up-link or the down-link or whether there is one broadcast in each country covered by the reception footprint. In the UK legislation it is the up-link where the broadcast occurs and the popular view seems to be that the satellite is merely a booster which enables an earth bound

transmitter to overcome the limits imposed by the curvature of the earth.

10.3 Then again, the footprint does not match national boundaries. For example, although Olympus will cover the UK and Ireland, Portugal, Spain, France, Germany, Norway and Italy, it will not confine itself to these states and will, for example, cover a part but not all of Sardinia, Norway and Sweden, half of Austria and Czechoslovakia and even a slice of Russia and Morocco. Furthermore, although there has always been some incidental overspill from earth bound transmitters, that from satellites is very large indeed if big enough receiving dishes are used.

10.4 Then there is the absence of copyright law common to all countries covered by the footprint. They will all have copyright law but it will differ considerably from one to the other. Some, like the UK, will not permit off-air recording for educational purposes whilst others such as Holland, Denmark and Germany will allow it. Cable distribution is also treated differently with some countries regarding it as a new use whilst others regard it as an extension of a broadcast. It is worth noting that whilst all countries in the Olympus footprint make broadcasting from a transmitter in its territory a use which copyright owners may control, not one makes the mere reception of a broadcast an infringement of copyright. Consequently, the reception of a broadcast from a satellite has no copyright implications in these countries. In the UK, a broadcast takes place where the transmission is intended for general reception so a transmission which is encrypted to retain privacy may not be a broadcast and the owner of copyright in any material included in the transmission may have no power to prevent it.

10.5 The EEC is interested because it wishes to treat broadcasts in the same way as goods or services, where unrestricted flow across frontiers is to be encouraged. This breaking down of national boundaries is in direct conflict with copyright practice and has resulted in a number of court cases and attempts by the EEC to encourage the harmonisation of EEC copyright law. Unfortunately, the Olympus footprint does not coincide with the EEC frontier so introducing another ingredient to the brew.

11. Maybe, in time, these problems will be resolved but the solutions will lag behind the technology. At present, there is failure among experts to agree even on the principles and a lack of urgency is only too apparent.

So, the guidance which follows should be seen as interim advice in an uncertain and volatile situation and is likely to be updated as the situation becomes clearer. It is based on the principle that rather than look for loopholes, which may be illusory, the producer should acquire permission on the assumption that contributors have the legal right to grant or withhold permission for satellite use.

Implications for producers of video programmes

12. The creator/producer of a video programme who decides to offer material for transmission over, in the first instance, the Olympus satellite, must accept that in theory the material will be accessible to the population of the countries covered by the footprint. In addition, there will be a considerable overspill and by the use of suitable dishes people well outside the nominal range of transmissions will be able to receive it.

13. Furthermore, in some countries it will be perfectly legal to record and subsequently replay the programmes for certain purposes which may include private and educational. Even where such use is illegal, as in the UK for example, it will certainly be expensive and time consuming to take any action against unauthorised use. It may be said that the degree of control which can be exercised by a copyright owner is less in respect of satellite broadcasting than through any other method of exploitation.

14. Of course, the potential for misuse will be much curtailed if the potential audience is limited because the programme is in English or receiving dishes are not readily available.

15. These considerations may be of no concern to a producer whose only wish is to disseminate the material to the widest possible audience but they could cause problems where the material has already been licenced for sale in a country covered by the footprint. For example, if a UK video has been licensed for sale or hire in Germany, the reception by satellite of the same item could seriously undermine the market and lead to a protest or worse from the German associate who has the licence to exploit.

16. Of greater importance are the rights which the producer must acquire in contributions made to the video by other rights owners. These contributions may include scripts prepared by academics, extracts from published material, photographs or other illustrations as well as music either recorded from a live performance or dubbed from a sound

recording. In addition there may be others who read, play or otherwise perform material and who will be separately protected under the Performer's Protection Acts (to be replaced by the provisions in the Copyright, Designs and Patents Act 1988).

What the producer should do

(Note. What follows is not intended to be a guide to negotiating permissions in making videos. This is to be found in 'Copyright and Distribution of Educational Audio-Visual Productions' available from ETA, The King's Manor, Exhibition Square, York YO1 2EP.)

17. Whether the programme already exists or is to be specially produced, it is imperative that the rights acquired permit, either implicity or explicity, the transmission of the material from the earth station to the satellite and from the satellite back to earth. If, in acquiring or commissioning a script or other item, the producer acquired the complete copyright then no further permission will be needed. But if, say, only the right to distribute in cassette form or to broadcast over UK transmitters was acquired then it will be necessary to seek an extension of the rights to cover the re-transmission from the satellite. The same will apply to agreements made with performers. It is also relevant that some countries covered by the footprint may include in their legislation the so-called moral right which protects authors from damage to their reputation caused by the unauthorised adaptation of their materials. This right re- mains with the author and cannot be transferred but the producer should ensure that any arrangements with contributors should include a provision that the producer is not liable for any infringement or alleged infringement of any right subsequent to the material being transmitted to the satellite nor can he be obliged to participate in any action a contributor may wish to take. In passing, a moral right for authors and film directors will apply in the UK under the Copyright, Designs and Patents Act 1988.

18. In practice there should be little difficulty when commissioning new material, the wider rights being taken at the outset although the performer or copyright owner may well ask for increased fees or royalties to reflect the wider use. Similarly, there should be no difficulties when dealing with the collecting agencies which licence material on behalf of all or most copyright owners of, especially, music. The Performing Right Society (PRS) will issue licences covering the satellite broadcasting of music whilst the Mechanical Copyright Protection Society (MCPS) will

licence the dubbing of music for satellite use. It is of interest to note that the PRS is itself unsure whether an encrypted satellite transmission is, legally, a broadcast for which a licence is necessary but this uncertainty is removed by the new copyright law.

19. More care will be needed when negotiating with contributors to existing programmes who may not be conversant with the implications of releasing material for satellite use, especially if they have been used to defining the licensing of rights in terms of territorial limits. As already suggested, the use of a term such as 'Europe' to define the limits of the right would not be appropriate where the footprint might cover or overspill far beyond the continent. (Where performers have already given permission to broadcast and to make copies for broadcasting purposes, no further permission will be needed from them for satellite broadcasting.)

20. The solution suggested is to take the right to transmit over the Olympus, or other specified satellite without any reference to countries covered. It may be necessary for the producer to explain what giving such permission entails, especially if the copyright owner has already licensed other use in those countries or anticipates doing so. In theory, and perhaps in practice in the long run, satellite transmission may render all other exploitation in the footprint area quite valueless.

21. As for the level of fees and royalties (if these are appropriate) the collecting agencies will have set rates probably geared to earth bound transmissions in the country of the footprint. Negotiation will be necessary with other rights owners and performers perhaps using the notional population covered by the footprint or an estimate of the likely audience which, having the necessary receiving dish, would be likely to be interested in the programme. Calculating the appropriate royalty will inevitably be a rather hit and miss affair although the producer must expect demands for sums which reflect the geographical extent of the footprint and its potential audience and the comparative lack of control over the use which may be made of the programme.

22. Royalties become a more exact science when the transmission is encrypted to restrict reception to authorised subscribers. Here there is the element of a 'box office' from which revenue can pass along the chain from ultimate user to individual contributors. Encryption has the added

advantage that reception of the material may be restricted to designated audiences. (Some producers, especially of medical programmes, may only use the satellite if an encryption facility is offered.) It is understood that the European Space Agency is considering the encryption issue.

23. The producer may also wish to explain to contributors that once the transmission comes back to earth the extent of protection of the contribution will depend on the national laws of copyright and performer's protection. As already explained, in some countries off-air recording and use will be legal in circumstances where it would infringe the copyright in the UK. On the other hand, the simultaneous and unaltered cable diffusion of a satellite broadcast within the intended area of the broadcast will be legal in the UK although consent may be needed in other states. The prudent producer will include in any agreement with contributors a clause which excludes the producer from any liability to take action or be joined in action in respect of any infringement or alleged infringement of the contributor's copyright or any other right in any country.

24. Finally, it must be remembered that the Olympus footprint covers the UK and educational insitutions here will be able to receive and use the material. On the other hand, unauthorised off-air recording is not permitted under the 1956 Copyright Act although some institutions may record perhaps within the guidelines described in the Annex. Here again, the new 1988 Act, once implemented, will introduce new provisions covering the off-air recording of broadcasts for educational purposes.

SUMMARY

Producers should ensure that the rights they have in all contributions to programmes cover the right to broadcast over the satellite, either because the rights acquired are comprehensive or specifically permit satellite broadcast. In particular, the arrangements made with all contributors should ensure that the producer has no obligation to enforce copyright or other rights either on his own behalf or on behalf of or in conjunction with any contributor.

Unless the broadcast will be encrypted, the calculation of fees or royalties can only be related to the nominal audience of the footprint rather than the actual audience or territory.

The legality of the use which will be made of the programme by those receiving it will depend on the laws governing that area and the level of protection will vary from one state to another.

In respect of Olympus, the footprint will cover the UK and although off-air recording will be an infringement of copyright some educational institutions may record either within the guidelines contained in the Annex or outside them.

ARRANGEMENTS BETWEEN PRODUCER AND SATELLITE OPERATOR

25. At the time of writing, it is too early to give guidance on what arrangements, practical or contractual, will be made between the educational producers of material and the European Space Agency which will operate the Olympus satellite. It is hoped that it will be possible to transmit to the satellite from a UK based transmitter rather than having to send a videotape to Belgium for the up-link part of the transmission. Since the service will be experimental it is unlikely that formal contracts will be exchanged between the ESA and the producer although some statements may have to be made about the technical quality of videotapes offered.

26. Discussions are proceeding about the need for an educational satellite users group. If this materialises, no doubt it will be the appropriate body to negotiate the detailed arrangements for use of the satellite.

Further information and advice on copyright matters may be had from Geoffrey Crabb, Rights Development Officer at NCET.

ANNEX

Statement on off-air recording for educational purposes

This statement was produced by the former Council for Educational Technology and reflects the situation under the 1956 Act.

1. Educational institutions frequently indicate the wish to be able, without infringing the law, to record and replay some of the broadcasts which are not specifically intended for educational institutions but which nevertheless are regarded as valuable educational resources. These broadcasts might include, for example, news bulletins, documentaries and discussions of current affairs. For the most part, the programmes are transmitted outside normal educational hours, and teachers often wish to record them for playback when pupils are assembled in class.

2. Generally speaking, the provisions of the Copyright Act 1956 and the Performers Protection Acts 1958 and 1963 make it illegal for programmes to be recorded off-air unless the prior permission of the owners of copyright and of performers has been acquired. Through the good offices of the BBC and independent companies, which have negotiated the necessary permissions on behalf of education, 'educational programmes' may be recorded off-air under certain conditions. But it is not normally feasible for an educational institution in advance of transmission to seek and obtain permission to record other programmes.

3. CET has therefore discussed with the organisations representing rights owners and performers the possibility of granting blanket licences, to be purchased in advance of transmission, that would permit limited acts of recording and replay for defined purposes. While most of the organisations are prepared on behalf of their membership to support a pilot experiment, the BBC and independent companies have stated themselves to be unable to participate because, despite the Council's initiative, the negotiation of permission to allow off-air recording would incur additional staff effort and the payment of additional royalties which, in the case of the BBC, could not be met from licence revenue. Both bodies are of the opinion that a change in the law is necessary, which will oblige programme contributors to permit off-air recording in return for remuneration.

4. Such a change was proposed by CET to the Whitford Committee on Copyright which, in its report published in 1977, recommended that statutory licencing for off-air recording for educational purposes should feature in a new copyright act. These changes, which are generally supported by the BBC and ITCA, would, if implemented, considerably ease the problem, and a new copyright act in 1988 is expected to include appropriate provisions.

5. In the meantime, it is clear that the Copyright Act and the Performers Protection Acts do not take account of the ease and convenience with which recording of both sound and video material can now be made. The energetic marketing of video-cassette machines is undoubtedly leading to much recording of broadcasts in breach of the Acts. Widespread disregard of the law must bring the law into disrepute and, while the Council recognises that to clear programmes for off-air recording would pose practical and administrative problems, it cannot but be disappointed that no attempt is to be made to clear even a small selection of programmes which are of undoubted educational value.

6. Until new legislation is available, those wishing to record for educational purposes are faced with the alternative of either refraining from all off-air recording of general service broadcasts, so losing a valuable teaching facility, or recording in defiance of the Acts.

7. Although a violation of the Performers Protection Acts is a criminal offence, not all broadcasts contain performances as defined by these Acts; in practice, it is often difficult to determine whether a programme does or does not include a performance. On the other hand, the Copyright Act is part of the civil law and enables the aggrieved party to pursue a civil action for damages.

8. Apart from the exception mentioned in paragraph 2, recording a broadcast off the air without prior permission could offend against the Performers Protection Act and would offend against the Copyright Act.

So far as the Copyright Act is concerned, if there is a breach of copyright, the damage suffered by the copyright owner would tend to be reduced if the following rules were to be adopted:

a) The recording is made only at the specific request of a teacher or for a specific teaching purpose.

b) The recording is not copied or released outside the institution.

c) The recording is not made available for open access.

d) It is erased as soon as the teaching need has been met.

It must be emphasised that these rules would only tend to reduce the damage suffered by the copyright owner and would not prevent any unlawful act from remaining unlawful and would have no effect on any criminal liability under Performers Protection.

Copies of the statements concerning the off-air recording of schools and continuing education programmes may be acquired from CET or from the BBC or ITCA.

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